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No. 83-2006

In the Supreme Court of the United States

October Term, 1983

WARREN JACKSON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTIONS OF LAW

- I. A decision of the Supreme Court construing the Fourth Amendment is to be applied retroactively at least to all cases pending on direct review.
- II. Under *Illinois v. Gates*, 103 S. Ct. 2317 (1983), there was a substantial basis for the magistrate to conclude that probable cause existed for the issuance of a search warrant.
- III. Police plain view observations of automobile parts in petitioner's van did not constitute a search, therefore, no warrant was required. Even if their observations could be construed as a search, it was permissible under *U. S. v. Ross*, 456 U.S. 798 (1982).

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To: The Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio.

The Court of Appeals, Eighth Judicial District, affirmed the convictions. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right

for the reason that no substantial constitutional question exists in this case.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is presented by the Petition for Certiorari.

HISTORY OF THE CASE

Petitioner, Warren Jackson, was indicted by a Cuyahoga County Grand Jury for three counts of Receiving Stolen Property and two counts of Possessing Criminal Tools. The receiving counts involved automobile parts, to-wit: a 1981 Buick front end, a 1982 Oldsmobile front end, and a bumper from an unknown automobile. The criminal tools were alleged to be petitioner's own 1978 GMC truck and his tool box including its contents.

Petitioner entered pleas of not guilty to the above-stated offenses, and sought to suppress the evidence seized in this action. The trial court denied petitioner's Motion to Suppress. Petitioner subsequently entered a plea of no contest and was found guilty on two counts of Receiving Stolen Property and one count of Possession of Criminal Tools. Thereafter, petitioner was sentenced.

On October 20, 1983, the Eighth District Court of Appeals affirmed the trial court's denial of petitioner's Motion to Suppress and the subsequent conviction. Petitioner filed a memorandum seeking jurisdiction in the Supreme Court of Ohio. The State Supreme Court denied jurisdiction on March 21, 1984. The present Petition for Writ of Certiorari to the Eighth District Court of Appeals followed.

STATEMENT OF THE FACTS

On March 16, 1982, Detective Kostura, employed by the City of Cleveland for approximately seventeen (17) years, was conducting a surveillance at 2375 Thurman Avenue, Cleveland, Ohio, based upon information provided by a reliable informant of the operation of a "chop shop" (R. 105).¹

At approximately 12:45 p.m., Detective Kostura observed a white truck pull up occupied by a driver and a passenger (R. 102). Detective Kostura observed these two black men load a front-end clip from an automobile into the rear of the white truck (R. 108). Detective Kostura made an in-court identification of Douglas Walker and petitioner as the males seen on March 16, 1982 (R. 110). Detective Kostura called for assistance, then approached the truck (R. 112).

Detective Wendell, who was also working surveillance of this area, arrived. Detective Kostura asked the suspects for identification, and placed the suspects under arrest (R. 118).

Detective Kostura testified, looking from the front of the truck through the door there was a wooden panel type door that separated the front seat from the rear of the truck (R. 115). At this time, Detective Kostura observed a green hood of a newer type of Oldsmobile automobile (R. 116, 117) (Joint Exhibit 1).

Detective Kostura was staking out this particular location based on information received March 3, 1982 from a reliable informant. Information from this informant

1. "Chop-shop" is a term known on the streets as an operation to rebuild or restore automobiles purchased with a valid salvage title put together with stolen automobile parts.

has led to the arrests and convictions of at least eight (8) to ten (10) individuals. Detective Kostura also looked in from the rear door of the white truck, which was up approximately one and one-half inches (1½"). Utilizing a flashlight, Detective Kostura observed aluminum wheels and a newer looking front-end clip (R. 231). Detective Kostura also learned from the owner of the building, George Martinek, that garage numbers five (5) and six (6) were leased to petitioner. Detective Kostura ran a routine check on petitioner and learned that he had been arrested on numerous occasions for auto theft related offenses.

Detective Sims was called in to assist in the investigation on March 16, 1982. Detective Sims has been employed by the Cleveland Police Department in Auto Theft Investigation in excess of ten (10) years (R. 144). Detective Sims also observed the green Oldsmobile hood in the white truck (R. 149).

Detective Sims provided information to Judge McAllister in attempting to secure a search warrant, specifically for 2375 Thurman Avenue, Cleveland, Ohio, garages five (5) and six (6), and a 1978 GMC white truck (R. 154) (State's Exhibits 3 & 4). Detective Sims testified to the execution of the warrant at 2375 Thurman Avenue, Cleveland, Ohio, and the inventory list of items confiscated (R. 164) (Defendant's Exhibit 3). Detective Sims noted the majority of items were: truck lids, doors, and front-end clips, objects he associated with the common practice of rebuilding automobiles with salvage titles and stolen parts (R. 168).

Detective Sims had investigated petitioner back in 1977 for auto theft.

Detectives Kostura and Sims successfully secured a search warrant from Judge McAllister based upon:

1. Reported information of the reliable informant;
2. Observations of activities on March 16, 1982 by both Detective Kostura and Detective Sims;
3. Prior convictions involving auto theft of Warren Jackson.

REASONS FOR DENYING THE WRIT

I. A DECISION OF THE SUPREME COURT CONSTRUING THE FOURTH AMENDMENT IS TO BE APPLIED RETROACTIVELY AT LEAST TO ALL CASES PENDING ON DIRECT REVIEW.

In *U. S. v. Johnson*, 457 U.S. 537 (1982), this Court held that a decision construing the Fourth Amendment is to be applied retroactively to all convictions not yet final at the time the Supreme Court decision is rendered, except where a case would be clearly controlled by existing retroactivity precedents. As a result, the rule in *Payton v. New York*, 445 U.S. 573 (1980), was held to be applicable to petitioner's conviction, which had been pending on direct appeal when *Payton* was decided. In the same way, the rule announced in *Illinois v. Gates*, 103 S. Ct. 2317 (1983) should apply to petitioner's conviction which was pending on direct appeal when *Gates* was handed down.

Petitioner contends, however, that the *Gates* rule should not apply to his case. He asserts that *Gates* "non-retroactivity" is preordained because it represents a rule of criminal procedure which is "a clear break with the past". *Desist v. U. S.*, 394 U.S. 248 (1969). This contention lacks merit under *U. S. v. Johnson*, 457 U.S. 537 (1982). For the *Gates* decision, as *Payton*, "did not announce an

entirely new and unanticipated principle of law". *Johnson*, at 215. Nor did *Gates* "expressly overrule a clear past precedent of this Court on which the litigants may have relied". *Id.* The *Gates* decision merely relaxed the standard for determining probable cause to issue a warrant based on an informant's tip. Under the former test in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. U. S.*, 393 U.S. 410 (1969), the magistrate was to consider only the informant's veracity, reliability, and basis of knowledge. Under *Gates*, the magistrate is to consider these same factors, but he is also to consider "all other circumstances set forth in the affidavit" before he makes a "practical and common sense decision". *Gates*, at 2332. Clearly, the *Gates* ruling has not caused "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule" as contemplated by petitioner. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

Therefore, there was no error in applying the *Gates* decision to petitioner's case. As in *Johnson*, to do so provides a principle of decision making consonant with this Court's original understanding in *Linkletter v. Walker*, 381 U.S. 618 (1965) and *Tehan v. U. S. ex rel. Shott*, 382 U.S. 406 (1966), that all newly declared constitutional rules of criminal procedure apply retrospectively at least to convictions not yet final when the rule was established.

II. UNDER ILLINOIS V. GATES, 103 S. CT. 2317 (1983), THERE WAS A SUBSTANTIAL BASIS FOR THE MAGISTRATE TO CONCLUDE THAT PROBABLE CAUSE EXISTED FOR THE ISSUANCE OF A SEARCH WARRANT.

Petitioner contends that there was an insufficient basis for Judge McAllister, and later Judge McManamon, to conclude that probable cause existed for the issuance of a

search warrant. A review of the record shows that petitioner's claim is unsupportable. Accordingly, his contention is meritless and does not warrant Supreme Court review.

In *Illinois v. Gates*, 103 S. Ct. 2317 (1983), this Court abandoned the rigid "two-pronged test" under *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. U. S.*, 393 U.S. 410 (1969), for determining whether an informant's tip establishes probable cause to issue a search warrant, and substituted the "totality of the circumstances" approach in its place. Now the task of the issuing magistrate is to look at all the "circumstances set forth in the affidavit before him" and make a "practical common sense decision whether there is a fair probability that contraband or evidence of a crime will be found in a particular place". *Gates*, at 2332. On appeal, the reviewing court should pay "great deference to the decision of the magistrate" and simply "ensure that he or she had a 'substantial basis for . . . concluding' that probable cause existed". *Gates*, at 2332 (quoting *Jones v. U. S.*, 362 U.S. 257, 271 (1960)).

The record in the instant case reveals an overwhelming factual basis upon which Judge McAllister could conclude that there was probable cause to issue the search warrant. First, a reliable informant stated he/she had observed black males taking extremely clean automobile parts from a white van and putting them into garages on Thurman Avenue. The parts were from late model vehicles, including complete front-end clips, hoods, doors, trunk lids and tires mounted on new wheels. This informant had previously supplied information which led to the convictions of eight to ten persons. Secondly, while conducting surveillance in the Thurman Avenue area on March 16, 1982, Detectives Kostura and Sims observed two black men load a front-end clip into the rear of a white truck. In

approaching the men, Detective Kostura asked for identification and requested to look inside the van. Although the request was denied, Detective Kostura looked in the partially opened up door of the van and saw aluminum wheels and a newer looking front-end clip. Detective Sims also saw a green Oldsmobile hood in the trunk. Thirdly, Detective Kostura learned from the building owner that the garages in question were leased to petitioner. A subsequent check revealed that petitioner had been arrested on numerous occasions for auto theft related offenses. In light of these facts, as they were presented to Judge McAllister, it is clear that there existed a substantial basis for concluding that stolen automobile parts were in the garages and the van. Accordingly, there was probable cause to issue a search warrant.

In addition, petitioner's contention that the police acted in bad faith is groundless. For the observations of the detectives were made in plain view. Further, no property was confiscated until after the warrant was issued.

III. POLICE PLAIN VIEW OBSERVATIONS OF AUTOMOBILE PARTS IN PETITIONER'S VAN DID NOT CONSTITUTE A SEARCH, THEREFORE, NO WARRANT WAS REQUIRED. EVEN IF THEIR OBSERVATIONS COULD BE CONSTRUED AS A SEARCH, IT WAS PERMISSIBLE UNDER U. S. V. ROSS, 456 U.S. 798 (1982).

Petitioner contends that a warrantless search of his van was conducted prior to the execution of the warrant. This contention, however, has no basis in the record. Accordingly, this claim is meritless and does not warrant Supreme Court review.

The record reveals that Detective Kostura and Detective Sims both observed a green hood from a newer model Oldsmobile in the rear of petitioner's van. Detective Kostura, with the aid of a flashlight, observed aluminum type wheels from the partially opened rear door of the truck. These observations were made in plain view, therefore, no search warrant was required. *Harris v. U. S.*, 390 U.S. 234 (1968). See also, *U. S. v. Lee*, 274 U.S. 559 (1927).

Even if there was a search, as the Eighth District Court of Appeals noted in passing, it was permissible under *U. S. v. Ross*, 456 U.S. 798 (1982). *Ross* held that the warrantless search of an automobile is not unreasonable if it is based on facts that would justify issuing a warrant. As discussed previously herein, there was an overwhelming factual basis to justify the issuance of the search warrant. Therefore, assuming *arguendo* that there was a search of petitioner's van, it fell within the Fourth Amendment exception to the warrant requirement as outlined in *Ross*.

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by this Court. The Petition for a Writ of Certiorari must be denied.

Respectfully submitted,

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